EU law

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<CTL>EU LAW</CTL>

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<UIP>What is today the European Union (EU)[1] began life in the 1950s as a supranational organisation comprising three Communities: the ECSC, the EEC, and Euratom. Established as a response to the catastrophe brought by the Second World War, the long-term aim of the Communities was to maintain peace and to prevent another war in Europe; their immediate objective, however, was to achieve economic integration among the participating states by building a common market.[2] Accordingly, gender and sexuality issues were very far from the Treaty drafters' minds back in the 1950s, when the founding Treaties of the Communities were prepared. Hence, it is not surprising that those Treaties did not make any reference to lesbian, gay, bisexual and transgender (LGBT) rights, nor did they include any provisions requiring equality between the sexes, bar an article which required equal pay for equal work between men and women (what is, currently, Article 157 TFEU), the rationale behind which

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[1] When referring to the present, the terms EU/EU law will be used since the Treaty of Lisbon abolished the pillar structure and the Communities (which comprised Pillar 1 of the EU construct) have been subsumed within, and have been replaced by, the EU. However, when describing the situation prior to the coming into force of the Treaty of Lisbon, the terms Community/EC law will be used, unless referring to a situation which does not fall within (what used to be) the first pillar.

[2] For more on the history of the EU see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2015), Chapter 1.

was, at the time, mainly economic.[3] However, equality between the sexes and the protection of LGBT rights now occupy a central position in EU law and, as a result of the introduction of mainstreaming provisions,[4] the EU institutions are required to take these aims into account when taking action in any policy area. Unfortunately these rarely feature in the subject matter of undergraduate modules on EU law. The following debates will demonstrate their importance.</UIP>

<DBTL>Debate 1</DBTL>

<DBSTL>Should discrimination against pregnant women be considered direct discrimination on the ground of sex?</DBSTL>

<UIP>It is generally accepted that women continue to be at a disadvantage in the employment market when competing with male workers, and the EU employment market is no exception to this.[5] Despite the fact that discrimination against pregnant women was widespread, especially in the early years in the Community's existence, none of the original Treaties or directives outlawing sex discrimination explicitly included a prohibition of such discrimination.

[3] Case 43/75 *Defrenne v Sabena II* [1976] ECR 455. See J. Maliszewska-Nienartowicz, 'Pregnancy discrimination in the European Union Law. Its legal character and the scope of pregnant women protection' (2013) 4 *Mediterranean Journal of Social Sciences* 441.

[4] Article 8 TFEU and Article 10 TFEU.

[5] Petra Foubert, 'Does EC pregnancy and maternity legislation create equal opportunities for women in the EC labor market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in *Boyle* and *Lewen*' (2002) 8 *Michigan Journal of Gender and Law* 219, 220.

The first challenges against it arose in the early 1990s, in the 'sister' cases of *Dekker*[6] and *Hertz*.[7]</UIP>

<IP>*Dekker* concerned the refusal of a training centre to employ the eponymous applicant on the ground that she was pregnant, despite the fact that she had been put forward as the most suitable candidate for the job. The European Court of Justice (ECJ) found that this amounted to direct discrimination on the ground of sex, contrary to the 1976 Equal Treatment Directive.[8] The Court explained that 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex'.[9] The Court also explained that</IP>

> <EXT>the reply to the question whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer to the first question.[10]</EXT>

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[6] Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

[7] Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark, acting on behalf of Hertz v Dansk Arbejdsgiverforening* [1990] ECR I-3979.

[8] Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

[9] *Dekker* (n. 6), para. 12. This was confirmed in a number of subsequent cases, such as Case C‑32/93 *Webb* [1994] ECR I‑3567 and Case C‑207/98 *Mahlburg* [2000] ECR I‑549.

[10] *Dekker* (n. 6), para. 17.

<UIP>In this way it demonstrated that in cases involving discrimination on the ground of pregnancy, there is no need to draw a comparison between men and women, but rather, a finding of discrimination on the ground of sex can *automatically* be made.</UIP>

<IP>In its judgment in *Hertz*[11] – delivered on the same day – the Court was concerned again with the issue of discrimination against pregnant women, but in this case the facts involved the dismissal of (as opposed to the refusal to employ) a pregnant woman. Here, the Court provided the further clarification that dismissal because of absence *during the period of maternity leave* is discrimination because of pregnancy and is, thus, direct discrimination on the ground of sex, whilst dismissal on account of repeated periods of sick leave *which appear after the period of maternity leave has expired* does not constitute direct discrimination on grounds of sex if a man would be dismissed for similar absenteeism.[12] Hence, a disadvantage suffered by a pregnant woman *in the period after her pregnancy and after her maternity leave has expired* does not *automatically* amount to (direct) discrimination on the ground of sex but, rather, a comparison must be drawn with members of the opposite sex in order to establish whether there is, indeed, (indirect) discrimination.[13]</IP>

<H1>**ARGUMENTS AGAINST CONSIDERING PREGNANCY DISCRIMINATION AS DIRECT DISCRIMINATION ON THE GROUND OF SEX**</H1>

<UIP>The main argument against considering discrimination against pregnant women as (automatically) amounting to direct discrimination on the ground of sex without needing to draw a comparison with a man, is that this rejects the inherently comparative concept of

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[11] n. 7.

[12] *Hertz* (n. 7), paras 14 and 16. This was confirmed in subsequent cases such as Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757.

[13] For a criticism of *Hertz* see Nicholas Bamforth, 'The treatment of pregnancy under European Community sex discrimination law' (1995) 1 *European Public Law* 59, 61–62.

discrimination. Moreover, some believe that if a comparative approach was taken, a finding of (direct) discrimination would not be made: if</UIP>

> <EXT>an absolute comparability approach is adopted, less favourable treatment of a pregnant woman cannot be directly discriminatory. A man is not capable of becoming pregnant and so the pre-requisite of equal treatment, that is, two similarly situated persons, is absent.[14]</EXT>

<UIP>Ellis has taken the argument further by considering the dynamics behind decision-making in cases involving pregnancy discrimination. She considers that the Court's approach in the pregnancy cases 'is unfortunate from the point of view of the underlying components of Community anti-discrimination law'[15] because</UIP>

> <EXT>an element of comparability is important to the component of adverse impact; if direct discrimination is defined simply as 'nasty treatment' on the ground of sex, enormous discretion is placed in the hands of courts and tribunals, who remain overwhelmingly male in composition, to decide what is to the detriment or advantage of complainants, the majority of whom are female. For reasons of objectivity, it is preferable if the adversity of the treatment received by the complainant is measured by means of a comparison with the treatment received or receivable by a member of the opposite sex, placed in broadly the same circumstances as the complainant.[16]</EXT>

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[14] Leo Flynn, 'Gender blindness in the face of real sex differences' (1993) 15 *Dublin University Law Journal* 1, 12.

[15] Evelyn Ellis, 'The definition of discrimination in European Community sex equality law' (1994) 19 *European Law Review* 563, 571.

[16] Ibid., 571–572.

<UIP>Another view is that a finding of discrimination against pregnant women *does* require a comparison to be made (and, thus, rejects the position that such discrimination *automatically* amounts to direct discrimination on the ground of sex), *albeit not with members of the opposite sex*. In particular, it has been suggested that the comparator should not be *another*, male, person but, rather, the *same* person albeit without the pregnancy: under such a view, the correct approach would be 'to compare the situation of the victim with that *that person* would have been in had it not been for the purported discriminatory cause'.[17] This is because pregnancy discrimination may have nothing to do with gender at all but may be 'caused by a desire to hurt the young, the heterosexual or the non-celibate, or caused by the jealousy of those (men or women) who are [not] able to have children'.[18]</UIP>

<IP>Moreover, some argue that discrimination against pregnant women is not *direct* discrimination on the ground of sex as not all women (can/want to) become pregnant,[19] and, thus, the category of those suffering a disadvantage (i.e. pregnant women) does not coincide exactly with the category of persons (that is, women in general) who bear a prohibited characteristic (sex), nor does the category of persons who receive an advantage (i.e. men and women who cannot/do not want to become pregnant) coincide exactly with persons of only one sex and, in particular, with persons of the sex which is normally advantaged (i.e. men).[20] Along these lines, Wintemute has argued that all claims of discrimination require the identification of an appropriate comparator and that, in the case of pregnant women, the comparator should be a non-pregnant (usually male) person with a comparable need for leave

[17] Simon Honeyball, 'Pregnancy and sex discrimination' (2000) 29 *Industrial Law Journal* 43, 49.

[18] Ibid., 51.

[19] Sally J. Kenney, 'Pregnancy discrimination: Toward substantive equality' (1995) 10 *Wisconsin Women's Law Journal* 351, 352.

[20] See, however, the different view of Advocate General Sharpston in paras 51–57 of her Opinion in Case C-73/08 *Bressol and Others v Gouvernement de la Communauté française* [2010] ECR I-2735.

with pay (e.g. because of illness). Such a comparison – he points out – will indicate in many cases that there is neutral treatment of pregnant women and ill men which, nonetheless, has a worse impact on women and, thus, amounts to indirect discrimination on the ground of sex.[21]</IP>

<IP>The ECJ's response to all the above arguments has been that because pregnancy is biologically unique to women, it is not necessary to compare pregnant women with a man to prove that there is discrimination; the mere existence of a disadvantage which is based on *biological features unique to women* suffices for an automatic finding that discrimination against pregnant women amounts to *direct* discrimination on the ground of sex.</IP>

<H1>**ARGUMENTS IN FAVOUR OF CONSIDERING PREGNANCY DISCRIMINATION AS DIRECT DISCRIMINATION ON THE GROUND OF SEX** </H1>

<UIP>Bamforth has been a proponent of the Court's approach in the pregnancy cases, noting that it 'outflanks the traditional liberal symmetry approach, a result which is surely to be welcomed given the weakness of the symmetry approach in countering sex discrimination and in ensuring substantive equality'.[22] Similarly, Jo Shaw has commented favourably on the Court's approach in this context, pointing out:</UIP>

> <EXT>It is now possible to argue that discrimination is not concerned so much with comparing the treatment of women with that of men, that is, setting up men as a norm against which women are to be tested as being the same as men, or different from men, but with examining the treatment of women which occurs *because they are women*. No longer is 'being treated equally' solely a male-defined standard of

[21] Robert Wintemute, 'When is pregnancy discrimination indirect sex discrimination?' (1998) 27 *Industrial Law Journal* 23.

[22] n. 13, p. 68.

what constitutes desirable social treatment, but rather an absolute evaluation by society of how women should be treated.[23]</EXT>

<UIP>Another argument which supports the ECJ's stance in its pregnancy case-law and its departure from an approach which compares pregnant women with ill men is that the latter approach equates pregnancy to illness and, thus, creates the impression that pregnancy is something unwanted and negative whereas in the vast majority of cases pregnancy is a desirable and socially important condition.[24]</UIP>

<IP>It will be evident that for this debate it suffices to use the more traditional, binary, definition of 'gender', whereby gender (as, essentially, gender identity and expression) is taken to coincide with the (biological) sex of an individual. For the next debate, a broader approach to 'gender' needs to be taken whereby a clear distinction between gender and sex is drawn, this meaning that a person's gender identity, expression, and/or life choices (including choice of partner) do not match those which – *stereotypically* – are demonstrated or made by someone belonging to that person's (biological) sex.</IP>

<DBTL>Debate 2</DBTL>

<DBSTL>Is discrimination on the ground of sexual orientation also discrimination on the ground of sex?</DBSTL>

<UIP>The question of whether discrimination on the ground of sexual orientation should be considered to amount to discrimination on the ground of sex is a question which has emerged under EU law in particular but, like the first debate, has been also considered in other legal contexts, both national and international. This debate is not merely of academic interest and

[23] Jo Shaw, 'Pregnancy discrimination in sex discrimination' (1991) 16 *European Law Review* 313, 319–320.

[24] Sandra Fredman, 'A difference with distinction: Pregnancy and parenthood reassessed' (1994) 110 *Law Quarterly Review* 106, 113.

this was even more the case when the above question first emerged in the EU context in the mid-1990s. This is because back then, the (then applicable) EC Treaty only prohibited discrimination on the grounds of sex and nationality,[25] and, thus, discrimination on the ground of sexual orientation would only be considered prohibited under EC law if it could be considered as a guise of one of these types of discrimination. Accordingly, until discrimination on the ground of sexual orientation was first prohibited by Directive 2000/78,[26] the only way under EU law to protect gays and lesbians from discrimination based on their sexual orientation was by recognising that such discrimination amounted to discrimination on the ground of sex. Nowadays, however, discrimination on the ground of sexual orientation is prohibited by Directive 2000/78 (in the employment context) and by Article 21 of the EU Charter of Fundamental rights (in all situations falling within the scope of EU law). Yet because discrimination on the ground of sex continues to be prohibited in more instances and in a broader context than discrimination on the ground of sexual orientation,[27] it remains important to establish whether discrimination on sexuality grounds can also be claimed as *sex* discrimination.</UIP>

<IP>The *Grant* case,[28] where the ECJ was firstly faced with the question which is the subject of this debate, was not the first instance that the Court was called on to rule on the

[25] Angela D. Byre, 'Equality and non-discrimination' in Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993) p. 211.

[26] Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[27] See, inter alia, Mark Bell and Lisa Waddington, 'Reflecting on inequalities in European equality law' (2003) 28 *European Law Review* 349; Erica Howard, 'The case for a considered hierarchy of discrimination grounds in EU law' (2006) 13 *Maastricht Journal of European and Comparative Law* 445.

[28] Case C-249/96 *Grant v South-West Trains* [1998] ECR I-621.

rights of LGBT persons under EC law. A couple of years earlier, in *P v S*,[29] the Court had already been invited to rule on the right of a male-to-female transsexual[30] to be protected from discrimination on the ground of having undergone gender reassignment surgery. In fact, it was the Court's pronouncement in this case, according to which discrimination on the ground of gender reassignment *is* a form of discrimination on the ground of sex, that formed the basis for the argument in *Grant* that discrimination on the ground of sexual orientation is, also, a guise of discrimination on the ground of sex. As explained by Lardy and Campbell, one way of reading the *P v S* judgment is to consider that the principle of equal treatment for men and women requires that</IP>

> <EXT>individuals (men and women) should be protected against less favourable treatment being accorded them because they do not share society's current perception of the different social roles and conduct appropriate to men and women.[31]</EXT>

<UIP>This approach to equal treatment in fact formed the basis of the argument made by the claimant in *Grant*. In this case, at issue was the refusal of South-West trains to grant to the female partner of one of their *female* employees the same travel concessions as were granted to the female partners of their male employees. The reason for the refusal was,

[29] Case C-13/94 *P v S and Cornwall City Council* [1996] ECR I-2143.

[30] The term 'transsexual' is taken to mean 'someone who is intending to undergo, is undergoing or has undergone gender reassignment treatment'. However, persons 'who do not perceive or present their gender identity as the same as that expected of the group of people who were given the equivalent sex designation at birth' are referred to as 'trans', which is an umbrella term which includes transsexuals. For more on these definitions see Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Routledge, 2002) pp. xxii f.

[31] Heather Lardy and Angus Campbell, 'Discrimination against transsexuals in employment' (1996) 21 *European Law Review* 412, 416.

simply, that Ms Grant's partner was female and, thus, of the same sex as her. Ms Grant claimed that although UK law at the time did not prohibit discrimination on the ground of sexual orientation, the contested refusal amounted to discrimination on the ground of sex and, thus, was contrary to Article 119 EC (now, Article 157 TFEU) and the EU and UK sex equality legislation applicable at the time. The issue was referred to the ECJ, which held that a) discrimination on the ground of sexual orientation was not discrimination on the ground of sex and b) discrimination on the ground of sexual orientation was not – at the time – prohibited by EC law. This position was confirmed by the ECJ in *D and Sweden v Council*[32] which reached it on appeal a few years after the *Grant* judgment.</UIP>

<IP>Since the cases which came after *Grant* and *D and Sweden v Council* and which involved discrimination on the ground of sexual orientation could be resolved by recourse to the prohibition of discrimination on the ground of sexual orientation laid down in Directive 2000/78[33] or under the EU Charter of Fundamental Rights,[34] the Court has not – since then – had to deal again with the question of whether discrimination on the ground of sexual orientation amounts to discrimination on the ground of sex. However, for the reasons explained earlier, this question remains important.</IP>

<H1>**ARGUMENTS AGAINST CONSIDERING DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION AS DISCRIMINATION ON THE GROUND OF SEX** </H1>

[32] Joined Cases C-122 and 125/99 P *D and Sweden v Council* [2001] ECR I-4319.

[33] Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757; Case C-147/08 *Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3591; Case C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* ECLI:EU:C:2013:823; Case C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* ECLI:EU:C:2013:275.

[34] Case C-528/13 *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* ECLI:EU:C:2015:288.

<UIP>Proponents of the view that discrimination on the ground of sexual orientation is *not* discrimination on the ground of sex base their position on the so-called 'equal misery'[35] argument. According to this view, the treatment suffered by same-sex couples is equally bad irrespective of the sex of the parties comprising them (i.e. whether it is two men or two women), and, thus, discrimination against same-sex couples cannot amount to discrimination on the ground of sex. Similarly, homophobic people and organisations tend to discriminate against *all* lesbians and gays and it is, thus, in very limited circumstances that there is only discrimination against male gay persons but not, also, against gay female persons or vice versa.[36] Hence, under this view, gay men and lesbians are (usually) treated equally badly and, thus, an Aristotelian approach to discrimination which requires that persons similarly situated are treated equally, *and which takes as its point of reference for judging whether two persons are similarly situated their sexual orientation*, leads to a conclusion that there is no discrimination on the ground of sex in situations involving discrimination against gay persons.</UIP>

<IP>The ECJ has espoused this view. Hence, in *Grant* the Court noted that</IP>

<EXT>[t]hat condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's

[35] Christine Denys, 'Homosexuality: A non-issue in community law?' (1999) 24 *European Law Review* 419, 422.

[36] An example of a situation where there is discrimination only against *male* gay persons can be seen in the context of blood donations whereby various countries impose a ban on giving blood on the MSM (i.e. men who have sex with men) population. For a case where there was a challenge of such a ban in the EU context see *Léger* (n. 34). For comments see Alina Tryfonidou, 'The *Léger* ruling as another example of the ECJ's disappointingly reticent approach to the protection of the rights of LGB persons under EU Law' (2016) 41 *European Law Review* 91.

regulations, applied regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex.[37]</EXT>

<H1>**ARGUMENTS IN FAVOUR OF CONSIDERING DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION AS DISCRIMINATION ON THE GROUND OF SEX** </H1>

<UIP>It is argued that the 'equal misery' approach ignores the fact that an accurate discrimination assessment requires only *one* of the circumstances of the person to be changed – in the case of sex discrimination, this being the sex of the persons compared – and if the sex of the person to whom a person is attracted is *also* taken into account, this leads to a change of two of the circumstances in the assessment.[38]</UIP>

<IP>This, in fact, demonstrates that the 'equal misery' approach seems to be based on a stereotypical reading of 'gender' which conflates sex and sexual orientation by considering that persons of one sex can only be attracted to persons of the *opposite* sex. In other words, according to this approach, women must love men and men must love women, and any women or men who do not fit this model can simply be ignored by the law and can be (legitimately) treated worse. Accordingly, by ruling that discrimination on the ground of sexual orientation is not also a form of discrimination on the ground of sex, the Court does not merely fail to protect lesbian and gay people and same-sex couples but in fact reinforces the discrimination suffered by them by insisting on a stereotypical view of sex and gender. As

[37] *Grant* (n. 28), para. 27.

[38] Leo Flynn, 'Annotation of Case C-13/94, *P* v *S and Cornwall County Council*, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143' (1997) 34 *Common Market Law Review* 367, 382; Robert Wintemute, 'Recognising new kinds of direct sex discrimination: Transsexualism, sexual orientation and dress codes' (1997) 50 *Modern Law Review* 334, 347.

Ms Grant – the applicant in the *Grant* case – argued, 'differences in treatment based on sexual orientation originate in prejudices regarding the sexual and emotional behaviour of persons of a particular sex, and are in fact based on those persons' sex'.[39]</IP>

<IP>Academics on both sides of the Atlantic are also of the view that discrimination on the ground of sexual orientation is a form of discrimination on the ground of sex. Andrew Koppelman has argued that discrimination against lesbians and gay men reinforces the hierarchy of males over females and, thus, amounts to discrimination on the ground of sex: '[t]he effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.'[40] The same author explained this by noting that</IP>

> <EXT>if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex … If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex.[41]</EXT>

<UIP>In another part of his article, Koppelman noted that '[l]aws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior – for

[39] *Grant* (n. 28), para. 18.

[40] Andrew Koppelman, 'Why discrimination against lesbians and gay men is sex discrimination' (1994) 69 *New York University Law Review* 197, 202.

[41] Ibid., 208.

example, sex with women – is appropriate for members of one sex, but not for members of the other sex'.[42] Similarly, Bennett Capers has noted that discrimination based on sexual orientation is essentially discrimination based on sex stereotyping and is, thus, a form of discrimination on the ground of sex; it is a 'subset of heterosexism':[43] '[d]iscrimination against lesbians and gays simultaneously flows from and perpetuates traditional notions of appropriate sex roles'.[44]</UIP>

<IP>In the European context, the most prominent supporter of the view that discrimination on the ground of sexual orientation is also discrimination on the ground of sex has been Robert Wintemute. He explains that in order to establish discrimination on the ground of sexual orientation, the comparator of the gay person is 'a heterosexual individual of the same sex as the gay, lesbian or bisexual individual' or – in the case of same-sex couples – an opposite-sex couple. Wintemute has explained that</IP>

> <EXT>because an individual's sexual orientation can only be defined by reference to the sex of the individual (and a couple's by reference to the sexes of its members), distinctions based on sexual orientation necessarily involve distinctions based on the sexes of the individuals.[45]</EXT>

<UIP>In other words '[w]hat makes the sexual orientation of a gay, lesbian or bisexual individual or a same-sex couple objectionable is the sex of the individual or of the members of the couple'.[46] Discrimination against gay persons and same-sex couples is discrimination on

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[42] Ibid., 219.

[43] I. Bennett Capers, 'Sex(ual orientation) and Title VII' (1991) 91 *Columbia Law Review* 1158, 1159.

[44] Ibid., 1159. See, also, John McInnes, 'Annotation of Case C-249/96, *Lisa Jacqueline Grant v. South West Trains Ltd*, Judgment of the Full Court of 17 February 1998 [1998] ECR I-636' 1051.

[45] Robert Wintemute (n. 38), 347. See, also, McInnes (n. 44), 1049.

[46] Robert Wintemute (n. 38), 347.

the ground of sex 'because it is an example of individuals' choices (whether of employment or of partner) being limited because of their sex'.[47]</UIP>

<IP>Despite the strength of the above arguments, the position of the Court appears to be still that discrimination against lesbians and gay men does not amount to discrimination on the ground of sex and, thus, under EU law, such persons can only rely on the prohibition of discrimination on the ground of sexual orientation when they are disadvantaged.</IP>

<H1>**CONCLUSION**</H1>

<UIP>This chapter has sought to demonstrate how gender issues have featured in EU law through the analysis of two 'debates' for which valid arguments may be made on both sides of each debate. I would tend to agree with the Court's position as regards pregnancy discrimination since, as pregnancy is a biological condition which is *unique* to women, a comparison with men is unnecessary: differential treatment which disadvantages women *because* they are pregnant should therefore be automatically considered to amount to discrimination on the ground of sex. The argument that discrimination on the ground of pregnancy cannot be considered *direct* discrimination on the ground of sex because not *all* women become pregnant seems to ignore the fact that policies and actors which consider pregnancy as an unwanted state create a structural disadvantage against *all* women, and not just women who actually become pregnant: the *mere potential* that each woman has for becoming pregnant puts her at a disadvantage in relation to men and, thus, it is not only women who are *actually* pregnant who are discriminated against by anti-pregnancy policies.</UIP>

<IP>On the other hand, the ECJ's approach in cases involving discrimination against lesbians and gays appears too superficial and indicates an inability to see that the reason behind such discriminatory treatment is not merely a person's homosexual sexual orientation

[47] Ibid.</FN>

but also – and more deeply – his or her failure to comply with the social expectations for his or her gender. Accordingly, if the Court wishes to outlaw discrimination on the ground of sex in all instances where this emerges, it should in future hold that discrimination against gays and lesbians is not merely discrimination on the ground of sexual orientation but is, also, a guise of discrimination on the ground of sex.</IP>

<H1>***Further Reading***</H1>

<REF>Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2013), Chapter 7.</REF>

<REF>Sandra Fredman, 'A difference with distinction: Pregnancy and parenthood reassessed' (1994) 110 *Law Quarterly Review* 106.</REF>

<REF>Alina Tryfonidou 'Discrimination on the grounds of sexual orientation and gender identity' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017).</REF>

<REF>Robert Wintemute and Mads Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001).</REF>